Rhina Bhar v Koid Hong Keat

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 25-33-91
MOHAMED DZAIDDIN AND ABDUL HAMID JJ AND CHEW KIM POH JC
27 APRIL 1992

Legal Profession *— Champertous agreement — Definition of complaint — Test at close of prosecution's case — Legal Profession Act 1976 ss 93, 95, 96 & 101 — Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970 rr 2, 3, 4 & 6 — Legal Profession (Practice & Etiquette) Rules 1978*

Words and Phrases *— 'Complainant' — Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970 r 2*

On 1 August 1987, the respondent wrote to the Bar Council complaining against several advocates and solicitors, including the appellant. The complaint against the appellant stem from an alleged oral agreement that the respondent was to be paid 10% of the amount collected by the appellant from clients in accident claims introduced by the respondent to the appellant. An inquiry was held by the disciplinary sub-committee of the Penang Bar Committee which found that as the respondent's claim for moneys due was contractual and not within the Legal Profession Act 1976 ('the Act'), redress should be sought from the court. It also recommended that, on the strength of the documents produced by the respondent, a complaint would lie against the appellant for breach of etiquette, that is, employment of a tout. The respondent instituted a civil action in the High Court, inter alia, for payment of his share of the fees collected by the appellant ('the suit'). A disciplinary committee ('the committee') was appointed by the Chief Justice and the respondent filed his statement of complaint with particulars of the cases that he had referred to the appellant and the payments that he had received from the appellant over a number of years. The appellant filed her statement of defence. After hearing the matter, the committee found that disciplinary action should be taken against the appellant and accordingly, suspended her from practice for a period of three months. The appellant appealed against the decision.

Held, dismissing the appeal:

(1) The original complaint and the statement of complaint were in substance the same. The statement of complaint was strictly confined to matters relevant or essentially related to the original complaint and did not contain irrelevant, unrelated or additional matters. Furthermore, the appellant, on receipt of the statement of complaint, did not raise any objection to it and instead filed her statement of defence. There was no merit on the ground that the committee was bound by the original complaint and could not inquire into matters set out in the statement of complaint.

(2) A complaint envisaged by s 95(1) of the Act must concern the conduct of an advocate and solicitor 'in his professional capacity'. A complaint purely for breach of contract which concerns a civil dispute simpliciter, unaccompanied by an allegation of misconduct, was not a complaint within the meaning of the section. In this case, one part of the complaint constituted a breach of etiquette. In the circumstances, the complaint was not over a civil dispute simpliciter but also concerned the conduct of the appellant as an advocate and solicitor in her professional capacity.

(3) The subject matter of the suit is for non-payment of moneys whereas the subject matter of the complaint and the inquiry was for breach of etiquette. They were two different matters before two different tribunals and the inquiry did not in any way prejudice the appellant's defence of the suit.

(4) Nowhere does the law state that only a client may complain against an advocate and solicitor. The word 'complainant' as defined in r 2 of the Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970 means anyone who makes a complaint. The appellant's argument that the respondent, not being a client of hers, had no locus standi to make the complaint fails.

(5) Both the original complaint and the statement of complaint were sufficiently clear as to what the professional misconduct was. The appellant was not in any way misled.

(6) The decision of the committee was not irregular just because it did not state the specific provision of the Act or the rule that had been breached. What was important was that there was sufficient evidence to support such a finding. Considering that the evidence required to prove the misconduct would be the same, failure to state the specific paragraph of s 93(2) of the Act or r 52 of the Legal Profession (Practice and Etiquette) Rules 1978 did not in any way prejudice the appellant or cause a miscarriage of justice.

(7) The committee was not wrong to apply the standard of proof of beyond a reasonable doubt before calling the appellant to enter her defence; even if the committee had erred, it erred in favour of the appellant. There was nothing wrong in the committee's use of the word 'rebut' in its ruling. The choice of words was unfortunate but did not mean that the committee had shifted the burden of proof to the appellant to prove her innocence; what was meant was that the appellant had to cast a reasonable doubt on the prosecution's case.

(8) There is no requirement in law that a person found guilty in criminal proceedings be given the right to make a plea in mitigation. It is only a practice and the failure of the committee to give the appellant such an opportunity did not affect the finding of guilt nor does it nullify the sentence passed.

(9) The order that the appellant be suspended from practice for three months was not manifestly excessive.

A [**Bahasa Malaysia summary**

Pada 1 Ogos 1987, penentang telah mengadu kepada Majlis Peguam terhadap beberapa peguambela dan peguamcara, termasuk perayu. Aduan terhadap perayu berdasarkan suatu perjanjian lisan yang dikatakan bahawa penentang akan dibayar 10% amaun yang dipungut B oleh perayu daripada klien dalam tuntutan kemalangan yang diperkenalkan oleh penentang kepada perayu. Suatu siasatan telah dijalankan oleh jawatankuasa kecil tatatertib Jawatankuasa Peguam Pulau Pinang yang mendapati bahawa kerana tuntutan penentang untuk wang yang kena dibayar adalah kontraktual dan di luar Akta Profesion Undang-Undang 1976 ('Akta itu'), tebus rugi harus diminta daripada mah- C kamah. Ia juga mencadangkan bahawa, atas kekuatan dokumen yang dikemukakan oleh penentang, suatu aduan boleh diambil terhadap perayu kerana perlanggaran etiket, yakni, penggajian seseorang untuk mencari klien (tout). Penentang telah memulakan suatu tindakan sivil di Mahkamah Tinggi, antara lain, untuk pembayaran bahagiannya D bayaran perkhidmatan yang dipungut oleh perayu ('guaman itu'). Suatu jawatankuasa tatatertib ('jawatankuasa itu') telah dilantik oleh Hakim Besar dan penentang telah memfailkan pernyataan aduannya berserta butir-butir kes-kes yang telah dirujukkan kepada perayu dan pembayaran yang telah beliau terima daripada perayu dalam beberapa tahun. Selepas mendengar perkara itu, jawatankuasa itu mendapati E bahawa tindakan tatatertib harus diambil terhadap perayu dan oleh itu menggantung beliau daripada menjalankan amalannya selama tiga bulan. Perayu telah merayu terhadap keputusan itu.

Diputuskan, menolak rayuan itu: F

(1) Aduan asal dan pernyataan aduan itu adalah pada amnya sama sahaja. Pernyataan aduan itu adalah terbatas hanya pada perkara yang relevan atau berhubung pada dasarnya kepada aduan asal dan tidak mengandungi perkara yang tidak relevan, tidak berkaitan atau tambahan. Lebih lagi, perayu, apabila menerima pernyataan G aduan itu, tidak menimbulkan sebarang bantahan padanya dan sebaliknya telah memfailkan pernyataan pembelaannya. Tiada merit atas alasan perayu bahawa jawatankuasa itu terikat oleh aduan asal dan tidak boleh menyiasat perkara yang dinyatakan di dalam pernyataan aduan itu.

(2) Suatu aduan yang dibayangkan oleh s 95(1) Akta itu mesti kena- H mengena dengan kelakuan seseorang peguambela dan peguamcara 'dalam tugas profesionalnya'. Sesuatu aduan semata-mata kerana kemungkiran kontrak yang kena-mengena dengan suatu pertikaian sivil simpliciter, tanpa disertai oleh suatu pengataan salah laku, bukan suatu aduan dalam maksud seksyen itu. Dalam kes ini, I sebahagian daripada aduan itu merupakan suatu perlanggaran etiket. Dalam keadaan begitu, aduan itu bukanlah tentang pertikaian sivil simpliciter tetapi juga kena-mengena dengan kelakuan perayu sebagai seorang peguambela dan peguamcara dalam tugas profesionalnya.

(3) Perkara guaman itu adalah kerana tidak membayar wang manakala perkara aduan dan siasatan itu adalah kerana perlanggaran etiket. Kedua-duanya adalah perkara yang berbeza yang berada di hadapan dua tribunal yang berlainan dan siasatan itu tidak sama sekali memudaratkan pembelaan perayu dalam guaman itu.

(4) Undang-undang tidak menyatakan bahawa hanya seorang klien yang boleh mengadu terhadap seseorang peguambela dan peguamcara. Perkataan 'pengadu' yang ditakrifkan dalam k 2 Kaedah-Kaedah Prosedur Peguambela dan Peguamcara (Siasatan Tata-tertib) 1970 bermaksud sesiapa yang membuat aduan. Hujah perayu yang penentang, bukan kliennya, tidak mempunyai locus standi untuk membuat aduan gagal.

(5) Kedua-dua aduan asal dan pernyataan aduan itu adalah cukup jelas tentang apakah salah laku profesional yang dibuat. Perayu tidak sama sekali terperdaya.

(6) Keputusan jawatankuasa itu bukanlah di luar aturan hanya kerana ia tidak menyatakan peruntukan tertentu Akta itu atau kaedah yang telah dilanggar. Apa yang penting ialah terdapat keterangan secukupnya untuk menyokong pendapat seperti itu. Memandangkan bahawa keterangan yang diperlukan untuk membuktikan salah laku itu adalah sama sahaja, kegagalan untuk menyatakan perenggan tertentu s 93(2) Akta itu atau k 52 Kaedah-Kaedah Profesion Undang-Undang (Praktis dan Etiket) 1978 tidak sama sekali memudaratkan perayu atau menyebabkan salah laksana keadilan.

(7) Jawatankuasa itu tidak salah memakai taraf pembuktian melampaui keraguan yang munasabah sebelum memanggil perayu untuk memasukkan pembelaannya. Walaupun jawatankuasa itu telah membuat kesilapan, ia telah membuat kesilapan memihak kepada perayu. Tidak pula salah bagi jawatankuasa itu menggunakan perkataan 'rebut' dalam keputusannya. Pilihan perkataan itu adalah tidak sesuai tetapi tidak bermakna yang jawatankuasa itu telah mengalihkan beban membukti kepada perayu untuk membuktikan yang beliau tidak bersalah; apa yang dimaksudkan ialah perayu harus menimbulkan keraguan yang munasabah atas kes pendakwa.

(8) Tiada keperluan undang-undang yang seseorang yang telah didapati bersalah dalam prosiding jenayah diberi hak membuat rayuan meringankan hukuman. Ia adalah hanya amalan dan kegagalan jawatankuasa untuk memberi perayu peluang yang sedemikian tidak melibatkan pendapat kebersalahan atau pun membatalkan hukuman yang dijatuhkan.

(9) Perintah yang perayu digantung daripada menjalankan amalannya selama tiga bulan tidaklah jelas berlebihan.]

Cases referred to

1 *Re Howard E Cashin* [1989] 3 MLJ 129 (folld)
2 *Haw Tua Tau v PP* [1981] 2 MLJ 49 (refd)
3 *Ragunathan v PP* [1982] 1 MLJ 139 (refd)
4 *Munusamy v PP* [1987] 1 MLJ 492 (folld)

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5 *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 (folld)
6 *KJ Barlow v PP* [1986] 2 MLJ 104 (refd)
7 *Jayaraman v PP* [1982] 2 MLJ 273 (refd)
8 *Watt or Thomas v Thomas* [1947] AC 484 (refd)
9 *Kim Guan Co Sdn Bhd v Yong Ngee Fan & Sons Sdn Bhd* [1983] 2 MLJ 8 (PC) (refd)
B
10 *Lim Kim Chet v Multan bin Masgut* [1984] 2 MLJ 165 (PC) (refd)

Legislation referred to
Criminal Procedure Code ss 173, 180
Legal Profession Act 1976 ss 93, 95, 96, 101
C Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970 rr 2, 3, 4, 6
Legal Profession (Practice & Etiquette) Rules 1978 r 52.

RR Sethu and *R Rajasingam* (*Rajasingam & Co*) for the appellant.
Gan Teik Chee (*Gan Teik Chee & Ho*) for the respondent.
D *Paul Manecksha* (*VP Nathan & Partners*) for the Bar Council.

Cur Adv Vult

Mohamed Dzaiddin J (delivering the judgment of the court): On 1 E August 1987 Koid Hong Keat (the respondent in this appeal before us) wrote to the Honourable Secretary of the Bar Council complaining against a number of advocates and solicitors, including Rhina Bhar (the appellant). The complaint against the appellant reads as follows:

> Since 1980 I have introduced 480 accident claims cases to her of which she F verbally agreed to pay me 10% out of 30% claims collected from the clients but to date he [sic] fail [sic] to honour.

An inquiry was held by the disciplinary sub-committee of the Penang Bar Committee. It was completed on 19 September 1987. In its report to the Bar Council pursuant to s 96 of the Legal Profession Act 1976 ('the Act'), G the sub-committee made the following findings and recommendations:

> Finding: The committee finds that the claim by the complainant for the moneys is a contractual one and therefore not within the purview of the Legal Profession Act. The complainant should seek his redress before the court. It is noted that the complainant has already commenced proceedings in the court to enforce his claims.

H

> Recommendation: It is recommended that no action be taken for the complaint of retention of moneys, *but* on the strength of the documents produced by the complainant the Hon Secretary Bar Council perhaps should be the complainant in a complaint made against the lawyer complained against, for breach of etiquette, ie employment of a tout. This decision is up to the inquiry committee.

I

It is to be noted that on 30 March 1987, the respondent commenced a civil action in the High Court at Penang, praying, inter alia, for the payment of the respondent's 'share of the fees received to date and hereafter', pursuant to the above-mentioned oral agreement. The suit is still pending.

Subsequently, a disciplinary committee ('the committee') was appointed by the Honourable the Chief Justice of Malaya.

On 16 June 1988, the respondent filed his statement of complaint, supported by very lengthy schedules containing particulars of the cases referred to the appellant by the respondent and the payments received by the respondent from the appellant for his services over a number of years.

As required by r 6 of the Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970 ('the 1970 Rules'), on 27 July 1988, the appellant filed her statement of defence.

The inquiry began on 18 January 1989. Thirteen witnesses gave evidence for the complainant (respondent) whilst one witness testified for the appellant. On 10 November 1989, the committee ruled that the appellant should be called to make her defence. Defence was heard. Finally on 19 June 1991, the committee gave its decision. It decided that disciplinary action should be taken against the appellant in accordance with s 101 of the Act and accordingly ordered that the appellant be suspended from practice for a period of three months in accordance with s 101(1)(b) of the Act.

The appeal was argued before us in two parts. The first part was centred on points of law which comprised grounds 1 to 8 in the originating notice of motion. Having ruled against the appellant on those grounds, the appeal was argued on the other grounds. We proceeded to hear the remaining grounds. On 21 February 1992, we dismissed the appeal and confirmed the order of the committee. We also ordered that the appellant pay the costs of the proceedings, including the costs incurred by the Bar Council, the inquiry committee and the disciplinary committee.

First ground

The first ground raised by Mr Sethu, learned counsel for the appellant, was that the committee was bound by the original complaint of the respondent (dated 1 August 1987) and therefore the Committee could not inquire into matters set out in the statement of complaint (dated 16 June 1988).

For easy reference, perhaps the relevant provisions of the 1970 Rules should be reproduced.

Rule 2 defines 'the complainant' as 'the person including an Advocate and Solicitor, who has made any complaint to the appropriate local Bar Committee under section 27 of the Ordinance'.

Rule 3 provides as follows:

(a) The Disciplinary Committee shall on commencing to function as such Committee call upon the Complainant to submit, within such time as may be fixed not being less than 14 days, four copies of a particularised statement in writing of facts without argument of his complaint in numbered paragraphs setting out the essential facts and the documents on which he proposed to rely in support of his complaint.

(b) Such statement shall be supported by a statutory declaration verifying the truth of the allegations made by the Complainant and shall have exhibited to it copies of all the documents referred to therein and intended by him to be relied on at the Enquiry; it shall also contain a proper address at which the Answer or any other document may be served by post on him.

A (c) A copy of such statement shall be served by the Disciplinary Committee on the Solicitor concerned by sending it to him by prepaid registered post at the address where the Solicitor concerned practises.

Rule 4 provides as follows:

B (a) The Disciplinary Committee shall ensure that such statement shall strictly be confined to matters relevant or essentially related to the original complaint made to the appropriate Local Bar Committee on whose recommendation the Disciplinary Committee was appointed.

(b) If such statement shall contain irrelevant, unrelated or additional matter it shall be returned by the Disciplinary Committee to the Complainant for him suitably to amend the same within such time as may be fixed not being less C than 14 days.

(c) The Disciplinary Committee shall thereupon, inform the Solicitor concerned of such action.

Having considered the original complaint and the statement of complaint subsequently filed we are of the view that the two complaints are, in D substance, the same. The crux of the complaint was that there was an agreement between the appellant and the respondent that the respondent was to be paid 10% of the amount collected by the appellant from the clients in accident claims introduced by the respondent to the appellant. As such we are of the view that the statement of complaint is 'strictly confined to matters relevant or essentially related to the original complaint'. Further- E more, it should be noted that r 4(b) empowers the committee to return the statement of complaint to the complainant (respondent) if it contains 'irrelevant, unrelated or additional matter'. The fact that the committee did not return the statement to the respondent shows that the committee was satisfied that it did not contain such matters. Again, the appellant, upon F receipt of the statement of complaint did not raise any objection to it. Instead she filed her statement of defence.

Under these circumstances, we are of the view that there is no merit in this ground.

Second ground

G

Secondly, learned counsel for the appellant submitted that by his original complaint the respondent was actually seeking a remedy for an illegal breach of contract. Breach of contract, he submitted, was outside the purview of s 95(1) of the Act. Section 95(1) provides:

H Any complaint concerning the conduct of any advocate and solicitor in his professional capacity or of any pupil or articled clerk shall in the first place be made to the Bar Council.

We agree that in law, a complaint envisaged by that section must be a complaint 'concerning the conduct' of such advocate and solicitor 'in his I professional capacity'. We also agree that a complaint purely for breach of contract and which concerns a civil dispute simpliciter, unaccompanied by an allegation of misconduct, does not constitute a complaint of the conduct of an advocate and solicitor within the meaning of s 95(1) of the Act — see *Re Howard E Cashin.*[1]

In this case, as far as the original complaint (dated 1 August 1987) is concerned, it is true that the respondent complained against the appellant for failing to honour the oral agreement between them. Indeed, it would not be unreasonable to say that the respondent would not have complained had he been paid his share, even if the appellant was all the while committing breaches of etiquette. But, reading the complaint, it is very clear that the non-payment of money complained about arose from a champerty agreement which contravened the Act and the Legal Profession (Practice and Etiquette) Rules 1978 ('the 1978 Rules'). Even the disciplinary sub-committee of the Penang Bar Committee noticed the two parts of the complaint. Hence, it recommended that no action be taken against the appellant for 'retention of money'. However, it recommended that the 'Hon Secretary Bar Council perhaps should be the complainant in a complaint ... for breach of etiquette, ie employment of a tout'.

Of course, the statement of complaint (dated 16 June 1986) was more elaborate and it specifically said that the complaint was made with a view that appropriate disciplinary action be taken against the appellant — see para 10 of the statement of complaint. That the appellant understood what the complaint was all about can clearly be seen from her statement of defence, in particular, where she admitted that she agreed to pay the respondent $80 or $100, as the case may be, for investigative work, but denied having agreed to pay '10% commission'. It is this last mentioned part which constitutes the breach of etiquette which is the subject matter of the inquiry.

In the circumstances, it is clear to us that the complaint was not over a civil dispute simpliciter. It was also a complaint concerning the conduct of the appellant as an advocate and solicitor in her professional capacity under s 95 of the Act.

Third ground

Thirdly, it was argued by learned counsel for the appellant that the complaint and the subsequent proceedings were an abuse of the process of the court as there was a pending civil suit on the same subject matter.

We are of the view that the subject matter of the suit is clearly for non-payment of money. On the other hand, the subject matter of the complaint and the inquiry is the breach of etiquette. Just as the court hearing the suit would not be making any order to punish the appellant for breach of etiquette; similarly the committee, inquiring into the complaint would not, indeed did not, make any order for payment of money by the appellant to the respondent. They are two different matters before two different tribunals, each discharging its duties empowered by law. We are of the view that the inquiry did not in any way prejudice the appellant in the defence of the suit. Indeed, it may assist her, because if the contract is unlawful, it would not be enforceable.

Fourth ground

Further, it was argued by learned counsel for the appellant that the respondent had no locus standi as he was not a client of the appellant.

A We are of the view that there is no merit in this argument. Nowhere does the law say that only a client may complain against an advocate and solicitor with regard to his or her professional conduct. Section 95(1) only speaks of 'any complaint'. It says nothing as to who may or may not be the complainant. Of course, sub-s (4) empowers the Bar Council to also make a com-
B plaint on its own motion.

Rule 2 of the 1970 Rules defines 'the complainant' to mean 'the person including an Advocate and Solicitor who has made any complaint ...'. In other words, whoever complains is a complainant. This ground fails.

Fifth ground

C Fifthly, it was argued that both the complaint by the respondent and the decision of the committee were vague in relation to the alleged professional misconduct.

Dealing first with the original complaint and the statement of the complainant. In our view, both are sufficiently clear as to what the professional
D misconduct was, ie the agreement to pay the respondent 10% of the fees collected by the appellant from the clients introduced by the respondent to the appellant.

As we have mentioned earlier the committee did not find it necessary to return the statement of complaint on the ground that it was vague. Further, the appellant did not complain that it was vague. Instead she filed her
E statement of defence. She was not in any way misled.

As regards the decision of the committee, it should be noted that on 18 January 1989, Mr Rajasingam, one of the counsel for the appellant, raised a preliminary objection before the committee that the complaint was 'not precise'. The objection was argued before the committee. The committee
F ruled as follows:

> Having heard the arguments raised, the committee decided that the issues raised fell within the ambit of the Legal Profession Act, namely, s 93(2)(b) [second and third parts] and (c) in respect of r 52 of the Legal Profession (Practice and Etiquette) Rules 1978.

G All these happened on the first day of the inquiry.

On 10 December 1989, the committee, in calling upon the appellant to make her defence, said:

> This committee is also satisfied from the evidence adduced from the complainant and the witnesses called by the complainant that there is an oral agreement made between the complainant and the respondent whereby the respondent
H shall be entitled to take 30% of every accident claim settled or awarded as compensation from the respective victims or claimants. Further, this committee also found that the respondent agreed to share her fees with the complainant to the extent of 10% of the amount settled or awarded as compensation in respect of accident cases which were introduced by the complainant and handled by the respondent. Such a champertous agreement made is wrong and in contravention
I of the Legal Profession Act 1976.

In its final order on 19 June 1991, the committee, inter alia, said:

> The committee therefore found as a fact that there was an agreement between the respondent and the complainant that the respondent was to retain 30% of the

amount awarded as compensation for each accident claim introduced by the complainant to the respondent and out of the said amount retained, the respondent was to pay the complainant 10% of the amount of each claim.

It was argued by learned counsel for the appellant that the order refers to s 93(2)(f) of the Act which was never adverted to at any stage.

To this argument, first, it should be noted that the committee in the final order did not mention under which provision of s 93, be it sub-s 2(f) or some other, it found that the appellant had committed a breach of. It must also be pointed out that, even in its ruling at the close of the complainant's case, it did not make any mention of any specific provision of the Act or the Rules. The only time it made such a reference was in its ruling after hearing the preliminary objection on the first day of the inquiry.

So it is not absolutely correct to say that the final order was made for a breach of para (f) of s 93(2).

It is also important to note that the alleged misconduct could fall under either paras (c) or (f) or (g) of the Act or even under r 52(b) of the 1978 Rules.

We are of the view that, first, there is nothing wrong for the committee not to state which specific provision of the Act or the Rule the misconduct was to have breached. It could have been under either of them. What is important is that there is sufficient evidence to support such a finding. Considering that the evidence required to prove the misconduct would be the same under either of the paragraphs and the rule mentioned above, failure to state the specific paragraph of s 93(2) or r 52, did not in any way prejudice the appellant or cause any miscarriage of justice.

Now, assuming, as submitted by Mr Sethu, that in the final order, the appellant was found to have breached para (f) of s 93(2) of the Act, is that ruling irregular simply because the committee had not mentioned it either in its ruling after hearing the preliminary objection on the first day of the inquiry or after the close of the complainant's case?

We do not think so. We do not think that the finding of the committee on the preliminary objection raised at the beginning of the inquiry precludes the committee from making a finding under any other provision of the law, especially, as in this case, where the 'offence' is overlapping, the evidence would have been the same and the appellant was not in any way prejudiced in making her defence. This ground fails.

Sixth ground

This ground is contained in paras 6, 7 and 8 of the motion. In short, learned counsel for the appellant complained that the committee in making the ruling at the close of the complainant's case the way it did, had 'prematurely and erroneously' ruled that the respondent (complainant) had established beyond reasonable doubt the case against the appellant and it was for the appellant 'to rebut' the case established. In other words, once again we are faced with the problem arising from the decision of the Privy Council in *Haw Tua Tau v PP*,[2] which was adopted in *Ragunathan v PP*[3] but sought to be explained in *Munusamy v PP*[4] and more recently in *Mohamad Radhi bin Yaakob v PP*.[5]

A On our part, we follow the views expressed by the Supreme Court in *Munusamy*:[4]

> ... that there is nothing in the *Haw Tua Tau* case to suggest that the '*prima facie case*' approach as understood in criminal trials in this country is wrong in principle. On the contrary ... it re-establishes once and for all that there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution. There is accordingly no rejection of the 'established beyond reasonable doubt' test provided that it is applied at the stage of the trial in the hypothetical form.

B

We also accept what is said by Mohamed Azmi SCJ, delivering the judgment of the Supreme Court in *Mohamad Radhi bin Yaakob v PP*,[5] at p 171:

C

> To earn an acquittal at the close of the case for the prosecution under s 173(f) or s 180 of the Criminal Procedure Code, the court must be satisfied that no case against the accused has been made out which unrebutted would warrant his conviction (*Munusamy v PP*). If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

D

It is true that in this case the committee did not stop short at saying that the committee was satisfied that there was a prima facie case for the appellant to answer, as in *Munusamy*'s case.[4] It is true that the committee went on to say:

E

> Any allegation of misconduct against an advocate and solicitor requires a high standard of proof. And the standard of proof as required by this disciplinary committee sitting in judgment on a colleague is not on a mere balance of probabilities but on proof beyond reasonable doubt. Looking into the totality of the evidence given, this committee is of the firm view that the burden of proof as required by law has been duly discharged.

F Admittedly, the committee, at that stage, was more than satisfied with what the complainant had to prove. But is that wrong? To our mind, it is not. On the other hand, it could be wrong if the committee were to apply a lesser burden of proof, say, on the balance of probabilities. In our view, even if the committee had erred, it erred in favour of the appellant. See also *KJ Barlow v PP*.[6]

G In this respect, it is also pertinent to note what had transpired before the committee. At the close of the complainant's case, it was strenously argued by both learned counsel for the appellant that the inquiry was criminal in nature and that the case against the appellant *must be proved beyond reasonable doubt*. Encik Ghazi, another learned counsel for the appellant,

H submitted:

> The C (complainant/respondent) has to prove the complaint not on a balance of convenience [sic] but beyond reasonable doubt ... The standard of proof required here is proof beyond reasonable doubt.

The ruling was attacked from another prong. It arises from what the

I committee said in the last paragraph of the ruling:

> If the evidence so far adduced is not rebutted by the respondent, it will warrant disciplinary action against the respondent under s 101 of the Legal Profession Act 1976. As such this disciplinary committee calls on the respondent to give her defence.

It was argued by Mr Sethu that the committee had unwittingly shifted the burden of proof to the appellant by requiring her to 'rebut' the complainant's case.

The use of the word 'rebut' may be unfortunate. However, it should be noted that even s 173(f) and s 180 of the Criminal Procedure Code (FMS Cap 6) and even in the Supreme Court in *Mohamad Radhi*'s case[5] the words 'if unrebutted' are used. We do not see anything wrong for the committee to use the word 'rebut'. Further, we are of the view that appeals should not be decided purely according to one or two words used by the committee. We should look at the record as a whole. We should look at the substance rather than words.

In all fairness it should be noted in the final order, on more than one occasion, the word 'rebut' was used, as in the first paragraph on p 4 of the order (p 23 of the appeal record):

> The question then for the committee to consider was whether or not the evidence given by the respondent and her witnesses and exhibits had rebutted the evidence presented by the complainant or created a doubt in the mind of the committee as to whether there was any agreement to share the respondent's fees with the complainant.

Even though we agree that the choice of words is rather unfortunate, it did not mean that the committee had shifted the burden of proof to the appellant to prove her innocence. What the committee meant was that the duty of the appellant was 'to cast a reasonable doubt in the prosecution case'. We are of the view that the decision was neither irregular nor was there any miscarriage of justice. We should look at the evidence as a whole to see whether the evidence justifies the decision or not.

For these reasons we disagree with Mr Sethu's submissions on grounds numbers 6, 7 and 8.

Seventh ground

Grounds contained in paras 9 to 15 of the motion can be conveniently taken together. Mr Sethu correctly admitted that the issue before the committee was one of credibility of the witnesses called by both sides.

It is trite law that this court, sitting on an appeal, should be slow to interfere with the findings of facts of the committee which had the advantage of seeing and hearing the witnesses unless that advantage is misused by the committee — see *Jayaraman v PP*;[7] *Watt or Thomas v Thomas*;[8] *Kim Guan Co Sdn Bhd v Yong Ngee Fan & Sons Sdn Bhd*;[9] *Lim Kim Chet v Multan bin Masgut*.[10]

The only issue here is whether, on the evidence adduced by both the respondent and the appellant, we are satisfied that the respondent had proved beyond reasonable doubt that there was an agreement between the appellant and the respondent whereby the respondent would be paid 10% of the fees collected by the appellant from clients introduced by the respondent to the appellant.

We had taken time to and in fact did go through the whole of the appeal record. We are of the view that there is overwhelming evidence both oral and documentary to support the respondent's case.

The appellant in her evidence admitted that she employed the respondent from 1980 to 1985. However, it was only to do investigative work for

A which she paid the appellant $80 for each client per case and $100 where there were two clients per case. She denied that she agreed to pay the respondent 10% commission out of the 30% she charged the clients. She denied any sharing of profits between them.

Considering the whole of the evidence we are of the view that the committee had come to a correct decision, that the complainant had, up to B the end of the case, proved beyond reasonable doubt that there was such an agreement, which was contrary to the provisions of s 93(2)(c) of the Act read with r 52 of the 1978 Rules, contrary to the provisions of sub-s 2(f) of s 93 of the Act. We are also of the view that the respondent had also proved, beyond reasonable doubt, that clients were in fact introduced by him to the C appellant. As such a breach of sub-s 2(g) was also committed.

Eighth ground

This is contained in para 16 of the motion. Mr Sethu argued that the committee erred in law in not giving an opportunity to the appellant to D make a plea in mitigation before the order suspending the appellant for three months was made.

It was admitted by Mr Gan Teik Chee, learned counsel for the respondent, that no such opportunity was given to the appellant.

To our minds, such failure cannot in any way affect the 'finding of guilt' (if we may use the term). If at all it may only affect the validity of the E 'sentence' (again using the term used in criminal trials).

We agree that the proceedings before the committee was criminal in nature. However, it should be noted that neither in s 173 of the Criminal Procedure Code (FMS Cap 6) (procedure in summary trials) nor in s 183 of that Code (where the trial is in the High Court) is there any reference to F the right of a guilty person to make a plea in mitigation of sentence. Of course, in practice, courts do give a person found guilty a chance to make such a plea before the sentence is passed. We are of the view that the practice is only a practice, not a requirement of the law and failure to give such an opportunity does not nullify the sentences passed.

G *Ninth ground*

The final ground which is contained in para 17 of the motion is regarding what can be conveniently referred to as 'sentence'. It was argued that the order of suspension of three months was excessive.

We considered the circumstances of the case, including the interests of H the public and the profession. We are of the view that the order of the committee is not in any way manifestly excessive or out of proportion. Indeed, it does appear to be on the lower side. We see no reason why we should interfere with the order of the committee on 'sentence'.

We dismissed the appeal.

I Pursuant to the provisions of s 108 of the Act we ordered the appellant to pay the costs of the proceedings including the cost of the Bar Council, the inquiry committee and the disciplinary committee.

Order accordingly.

Reported by P Arul Selvamalar